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Nos. 81-1920, 81-1921, 81-1922

# In the Supreme Court of the United States

**October Term, 1981**

PANHANDLE EASTERN PIPE LINE COMPANY, ET AL.,
*Petitioners,*

vs.

MOBIL OIL CORPORATION, ET AL.,
*Respondents.*

NORTHERN NATURAL GAS COMPANY, ET AL.,
*Petitioners,*

vs.

MOBIL OIL CORPORATION, ET AL.,
*Respondents.*

CITIES SERVICE GAS COMPANY, ET AL.,
*Petitioners,*

vs.

MOBIL OIL CORPORATION, ET AL.,
*Respondents.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## SUPPLEMENTAL BRIEF OF PETITIONERS PANHANDLE EASTERN PIPE LINE COMPANY AND NATIONAL HELIUM CORPORATION IN REPLY TO BRIEFS OF LESSEE-PRODUCER RESPONDENTS AND LANDOWNER RESPONDENTS AND TO MEMORANDUM OF THE UNITED STATES

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## STATEMENT

The various Lessee-Producer Respondents, the Landowner Respondents and and the United States have each filed briefs addressed collectively to the three companion cases filed by the Helex petitioners. Similarly, the petitioners, Panhandle Eastern Pipe Line Company and National Helium Corporation, reply collectively to such respondents and the United States concerning arguments first raised in their briefs.

## ARGUMENT

### Finality of Previous Decisions

In various ways and with varying degrees of enthusiasm the Lessee-Producer Respondents urge that because of the numerous decisions by the lower courts and the previous denials by this court of petitions for certiorari, the issues relating to liability have become final and petitioners are not at liberty to seek further consideration by this court.[1]

The Respondents should know that the ball game is not over until the final whistle is sounded. The Supreme Court has repeatedly emphasized that its denial of certiorari, without comment, carries no implication of the Court's opinion on the merits of the case. In *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1949), the Supreme Court revealed some impatience in having to again repeat this well known principle. The Court said:

"Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four

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1. Brief of Amoco et al, p. 5, Brief of Gulf Oil Corporation, p. 8 et seq. Brief of Mobil et al., p. 13.

members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again, again and again the admonition has to be repeated."

The case of *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1915) applied this principle in a case which had been bifurcated in two phases similar to the present litigation. The case involved alleged violations of a trademark and was divided into a first phase relating to liability and the right to an injunction and a second phase relating to damages. After denying certiorari following the first phase, the Court granted the petition following trial of the second phase. The respondents made the same contentions with respect to finality as are being made by Respondents here. The Court declared:

"It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ is in no case equivalent to an affirmance of the decree that is sought to be reviewed. And, although in this instance the interlocutory decision may have been treated as settling 'the law of the case' so as to furnish the rule for the guidance of the referee, the district court, and the court of appeals itself upon the second appeal, this court, in now reviewing the final decree by virtue of the writ of certiorari, is called upon to notice and rectify any error that may have occurred in the interlocutory proceedings." 240 U.S. 251, 258 (1915)

See also *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363 (1973).

In addition to the need for reviewing errors of the Circuit Court committed in the liability phase, this court should grant the petition in order to review additional errors committed in Phase II. In none of the previous petitions for certiorari in this litigation or in related litigation have the following issues been presented.

(1) Whether the Circuit Court failed to follow *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125 (1974) by applying federal law rather than state law with respect to the doctrine of quantum meruit.

(2) Whether the Circuit Court may properly imply a contract for the benefit of third parties where the issue was not presented to the trial court but the trial court's findings negated the existence of such a contract.

(3) Whether the findings of fact and conclusions of law in one case are binding on parties to another case through the law of case doctrine where the significant facts are not the same.

(4) Whether the Circuit Court deprived the parties of due process by the manner in which the case was managed.

**Third Party Beneficiary Issue**

The third party beneficiary issue is critical because it is the only theory which the Court has used to support a "floor" in the work-back methodology. The existence of the floor makes a mockery of work-back and prevents a true application of the procedure. It permits the use of work-back but only so long as it benefits the Lessee-Producers and Landowners. If it should reveal that one or more Helex companies had little or no profit, they must nevertheless pay the minimum value. If the possibility

of little or no profit did not exist, there would be no need for a floor.

The Respondents have considerably confused the third party beneficiary issue by attempting to argue the merits of $2 per Mcf as a minimum value rather than to face the issue of whether the Circuit Court may imply a contract for their benefit under the circumstances here involved. (Brief of Amoco et al. p. 7 and 8. Brief of Mobil et al. p. 16 and 17. Brief of Landowners, p. 7 et seq.)

In further confusion of the issue, the Landowners seem to argue that even if the Circuit Court was in error in writing a de novo contract for the benefit of third parties, the Helex companies were not really harmed because the $3 indemnity provision (quoted at Joint Appendix A13 of the extended argument in their brief) constitutes a firm obligation on the part of the Helex companies for their benefit. (Landowner Br. p. 9 and 10.) The net of this argument is that an agreement for limited indemnity against possible claims is an acknowledgment of the validity of those claims. If this were to be the law, it would be a sudden death for all future indemnity agreements.

In the hope of reducing the confusion, we list here pertinent facts which we believe to be uncontroverted and which together demonstrate that the Circuit Court overextended itself in finding a contract for the benefit of third parties.

(1) The issue of whether the $2 per Mcf, considered by the United States in negotiations, constituted a contract for the benefit of third parties was not presented to the trial court. (See Gulf Brief p. 7)

(2) The Trial Court found that the $2 per Mcf: "appears only in evidence which reflects the manner in which the United States reached its own cost estimates to form a basis for actual contract negotiation. The figure reflects no more that the estimate of the Bureau of Mines of the cost it would probably incur, in the operation of its own extraction plant, to acquire helium extraction rights from a natural gas stream." (Joint Appendix A239)

(3) The $2 figure does not appear in any contract.

(4) The Circuit Court did not find an express third party agreement but rather implied an agreement relying primarily on a memo by an agency not having a part in the negotiation process. (Joint Appendix A15)

(5) The Helex companies have had no opportunity to rebut the evidence relied upon by the Circuit Court, since the theory was first advanced by the Circuit Court in the opinion for which review is sought in these proceedings.

**Memorandum of the United States Not Opposing Petitions for Writs of Certiorari**

With the possible exception of the issue of federal versus state law, the United States agrees with the petitioners concerning the law applicable to the important issues in this litigation. However, for a variety of reasons the government refrains from urging this court to grant the petitions. We believe the Supplemental Brief of Northern Natural Gas Company et al. accurately corrects the factual discrepancies in the government's brief and ap-

propriately responds to the concerns of the United States. We will not duplicate those statements here.

However one matter of special meaning to these petitioners is dealt with in a casual manner in footnote 7, p. 9 of the United States memorandum. This refers to gas purchase contracts between Lessee-Producers and Panhandle Eastern Pipe Line Company which were made well after public knowledge of the helium conservation program and specifically deal with the ownership of the helium constituent of the gas stream. (See discussion, Petition for certiorari, case No. 81-1920, p. 13 and 14. The contracts appear at Joint Appendix A578 through A607.) The contracts represent an attempt to settle in advance by special contract provisions the very issues of liability which are involved in this litigation. It would appear *prima facie* that there is no lawful reason why parties cannot do this. The United States attempts to brush this important matter under the carpet by saying: "The district court's treatment of these six contracts, however, inextricably relies upon the court of appeals' original rationale for finding the Helex Companies liable for the reasonable value of the helium component of the gas stream." The rationale of the Circuit Court with respect to the liability issues, as the rationale applies to oil and gas leases and gas purchase contracts made before general knowledge of the value of helium in natural gas and with no special reference to helium, simply has no application to these specially negotiated contracts. To support the holding of the Circuit Court as applied by the trial court is to conclude that there is no way knowledgeable business people can sit down in anticipation of a known liability issue and deal with it by contract. This matter ineluctably requires review by this court.

Respectfully submitted,

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